No. 12,152

IN THE

United States Court of Appeals

For the Ninth Circuit

WALTER A. SHAYLOR and
GLADYS SHAYLOR,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' OPENING BRIEF.

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APPELLANTS' OPENING BRIEF.

The appellants were the plaintiffs in an action for damages for personal injuries against the appellee under the Federal Tort Claims Act. Following a trial by the Court, the Court rendered a judgment for the appellants against the appellee and awarded appellants $500 as general damages and $460.25 as special damages, by reason of the negligence of the appellee in the premises.

The appellants prosecute this appeal contending that a new trial should be granted appellants on the issues of damages only.

JURISDICTIONAL STATEMENT.

Following are the statutory provisions believed to sustain the jurisdiction:

1. Jurisdiction of the District Court.

U.S.C.A., Title 28, c. 20, Section 931, subdivision (a) provides that the District Courts shall have exclusive jurisdiction for any claim against the United States on account of personal injury in the district wherein the act complained of occurred.

2. Jurisdiction of this Court upon appeal.

U.S.C.A., Title 28, c. 20, Section 933(a) (1) provides that final judgments in the District Courts in cases under Federal Tort Claims Act shall be subject to review by appeal in the Circuit Courts of Appeals in the same manner and to the same extent as other judgments of the District Courts.

3. Pleadings necesary to jurisdiction.

Complaint. (R. 2.)

Answer. (R. 5.)

Judgment. (R. 13.)

Motion for new trial. (R. 14.)

Order denying new trial and amending judgment. (R. 15.)

Notice of appeal. (R. 17.)

STATEMENT OF THE CASE.

On March 5, 1946, one of the appellants, Gladys Shaylor, hereinafter called Gladys, was injured, as a pedestrian, at the intersection of Van Ness Avenue and McAllister Street, San Francisco, California, by a truck owned and operated by the appellee; that at the time of said injury, Gladys was about 19 years of age and that she reached majority, or 21 years of age, at the time of the trial of said action on April 12, 1948.

During said trial, which continued for two and one-half days, the evidence offered and admitted on behalf of appellants was to the effect that appellant Gladys was collided with, at said time and place, by a U. S. Coast Guard truck, and rendered unconscious and remained unconscious for about twelve hours (R. 25-26, 61); that as a result of said collision, Gladys received the following personal injuries: cerebral concussion, contusions of the scalp, contusion of right shoulder, possible fracture of the pelvis, contusion of the bladder, multiple contusions and abrasions and strains of extremities (R. 26); that since said injury and at time of trial, two years later, Gladys was wearing a special surgical belt on prescription of her doctor, to relieve her from pain from said pelvic injury (R. 63); that it was the expressed opinion of her attending physician that the injury to her pelvis was permanent (R. 38-39); that although Gladys was only 21 years of age at time of trial, she was suffering pains and headaches

as a result of said injuries and in the opinion of the attending physician, such headaches would continue for an indefinite period (R. 39-40); that the special damages suffered by appellants were about $1064.73, as follows: for Dr. John Robert Sullivan, attending physician, $600.50 (R. 40-42); for hospital from March 2 to March 22, 1946, $211.85 (R. 70); for Dr. August Spitalny, pelvic examination, $25.00 (R. 73); for Dr. Frank W. Lusignan, $20.00 (R. 73); for twenty-eight days off work, sick leave, $187.38 (R. 70); for medicine to date, $20.00 (R. 74).

On May 7, 1948, the trial Court made and entered its judgment in said action in favor of appellants and against appellee and by its findings of fact and conclusions of law, found that appellee was negligent at said time and place (R. 12), and that by reason thereof, appellants were entitled to have and recover a judgment against appellee in the sum of $960.25, viz.: $460.25 as and for special damages and $500.00 as and for general damages. (R. 12-14.)

On May 17, 1948, appellants filed a motion for new trial on part of the issues in said action, viz.: as to the damages, general and special. (R. 14-15.)

On September 7, 1948, the trial Court made an order entered and filed September 9, 1948, denying said motion for new trial and amending said judgment as to general damages, only, by increasing the general damages from $500.00 to $1000.00, and awarding appellants a judgment in the sum of $1460.25. (R. 15-16.)

On October 25, 1948, appellants filed a notice of appeal from said judgments entered and filed May 7, 1948, and entered and filed September 9, 1948, as to the amount of damages, general and special. (R. 17.)

The questions on appeal are whether or not the trial Court erred: (1) in its rulings as to admission of certain evidence; and (2) as to the findings of fact and conclusions of law as to damages, general and special, as follows, viz.:

1. that during the trial, over the objection of appellants, the trial Court permitted appellee to cross-examine Gladys, as to insurance and as to the amount of moneys received from such insurance on account of medical and hospital expenses arising out of said personal injuries (R. 66, 79-83);

2. that although the appellants offered evidence which was admitted to the effect that appellants suffered damages for medical and hospital expenses and loss of time by reason of said negligence of appellee, in the sum of about $1064.73, the trial Court gave judgment that appellants may recover only $460.25 as and for special damages (R. 12-14);

3. that although Gladys was rendered unconscious and remained unconscious for about twelve hours, by reason of the negligence of appellee, and suffered personal injuries, as follows: cerebral concussion, contusion of scalp, contusion of right shoulder, possible fracture of pelvis, or symphysis pubis, contusion of bladder, multiple contusions and abrasions and

strains of extremities and although Gladys was suffering pain and headaches at time of trial, two years later, the trial Court rendered judgment for appellants by reason of said negligence in the sum of only $500.00 as and for general damages, after awarding appellants $460.25, as special damages (R. 12);

4. that although appellants made a motion for new trial on the grounds of inadequacy of damages, both general and special, the trial Court denied said motion but amended the judgment as to general damages by increasing the general damages from $500 to $1000 and failed and refused to increase the special damages. (R. 15-16.)

SPECIFICATION OF ERRORS.

Assignment of Error No. 1.

The Court erred in permitting appellee to cross-examine Gladys, appellant, over objection, relative to any insurance which she received, independent of appellee; that said witness was asked: "Do you have any accident insurance?" whereupon appellants' attorney objected to that question on the ground that it was incompetent, irrelevant and immaterial—that any source of insurance is immaterial and incompetent (R. 66); that later, during the trial, the Court ruled that any witness may be called as to the amount of insurance payments they had received (R. 79); that thereupon counsel for appellee called Gladys and examined her as to accident insurance

carried and as to money received from that source (R. 80-83), and attempted to impeach the witnesses by reason thereof. (R. 80-83, 92-93.)

> "The Court: She has testified that he rendered bills for $140.00 and $110.50. If this fund paid this amount or if it is paid by this group insurance, then under the late decisions, I am under the impression now that I am not going to put the Government in the position of paying the bills twice. It is the plaintiff's duty to put in the case to establish these matters. *It seems to me that this plaintiff destroys all the evidence now in regard to the bills.*" (R. 82-83.) (Italics ours.)

Assignment of Error No. 2.

The Court erred in failing and refusing to sign and enter the findings of fact and conclusions of law as to special damages prepared and submitted by appellants (R. 9) and in making and entering its findings of fact and conclusions of law as to special damages (R. 11) for services of physicians, surgeons, rœntgenologist, hospital and other medical attention, in the sum of $460.25; that Dr. Sullivan, appellants' physician testified, without contradiction, that his bill for services rendered was $600.50 (R. 40-42); that appellants testified that their special damages were $1064.73, as follows: for Dr. Sullivan, $600.50 (R. 40-42); for hospital, $211.85 (R. 70); for Dr. Spitalny, $25.00 (R. 73); for Dr. Lusignan, $20.00 (R. 73); for loss of 28 days of work, sick leave, $187.38 (R. 70); for medicine to date, $20.00. (R. 74).

Assignment of Error No. 3.

The Court erred in failing and refusing to sign and enter the findings of fact and conclusions of law as to general damages prepared and submitted by appellants (R. 9) and in making and entering its findings of fact and conclusions of law as to general damages (R. 11) in the sum of $500.00 by reason of the premises; that the evidence before the Court shows that Gladys, appellant, was rendered unconscious and remained unconscious for about 12 hours (R. 25-26, 61); that by reason of the premises, Gladys, appellant, received the following personal injuries: cerebral concussion contusions of the scalp, contusion of the right shoulder, possible fracture of the pelvis, contusion of the bladder, multiple contusions and abrasions and strains of extremities (R. 26); that she still had pain and headaches, at the time of trial, two years later (R. 39-40); that she was wearing a special surgical belt, on doctor's prescription, to relieve her from pain from said pelvic injury, at time of trial. (R. 63.)

Assignment of Error No. 4.

The Court erred in failing and refusing to sign and enter the findings of fact and conclusions of law as to permanent injury prepared and submitted by appellants (R. 9) and in making and entering its findings of fact and conclusions of law as to permanent injury (R. 11); that Dr. Sullivan, attending physician, testified that the injury to her pelvis, symphysis pubis, was permanent. (R. 38-39.)

Assignment of Error No. 5.

The Court erred in failing and refusing to grant appellants' motion for new trial on part of the issues, viz.: as to damages, general and special, on the grounds: (1) insufficiency of the evidence to justify the decision and that the decision is against law; and (2) error in law occurring at the trial and excepted to by said appellants. (R. 14.)

Assignment of Error No. 6.

The Court erred in making the order dated September 7, 1948 and filed September 9, 1948 (R. 15), amending said judgment made and entered May 7, 1948, awarding appellants only $460.25, as and for special damages (see assignment of error No. 2, for review of the facts in support of said assignment of error, which are incorporated herein, in support of this assignment of error No. 6).

Assignment of Error No. 7.

The Court erred in making the order dated September 7, 1948 and filed herein September 9, 1948 (R. 15), increasing the damages awarded appellants from $500 to only $1000, as and for general damages. (See assignment of error No. 3, for review of the facts in support of said assignment of error, which are incorporated herein, in support of this assignment of error No. 7.)

Assignment of Error No. 8.

The Court erred in making the order dated September 7, 1948 and filed herein September 9, 1948 (R. 15) in which it made a finding that there was no "intention at any time on the part of the Court to make any deduction in the amount allowed as damages by reason of any accident insurance, or other insurance carried by" the appellant (R. 15) (See assignment of error No. 1, for review of the facts in support of said assignment of error, which are incorporated herein, in support of this assignment of error No. 8).

Assignment of Error No. 9.

The Court erred in making the order dated September 7, 1948 and filed herein September 9, 1948 (R. 15) in which it made a finding that there was "no permanent injury to Gladys" one of the appellants. (R. 15.) (See assignment of error No. 4, for review of the facts in support of said assignment of error, which are incorporated herein, in support of this assignment of error No. 9.)

Assignment of Error No. 10.

The Court erred in the computation of the items of special damages in making its findings of fact and conclusions of law (R. 11) and in making its amended order dated September 7, 1948 and filed herein September 9, 1948. (R. 15.) (See assignments of errors Nos. 1 and 2, for review of the facts in support of said assignments of errors, which are incorporated herein, in support of this assignment of error No. 10.)

ARGUMENT.

1. **THE DECISION OF THE TRIAL COURT AS TO THE SPECIAL DAMAGES IS CONTRARY TO LAW AND NOT SUSTAINED BY THE EVIDENCE. THE WRONGDOER IS NOT ENTITLED TO HAVE THE SPECIAL DAMAGES FOR WHICH HE IS LIABLE REDUCED BY PROVING THAT PLAINTIFF, THE INJURED PARTY, HAS RECEIVED COMPENSATION FOR THE LOSS FROM A COLLATERAL SOURCE, WHOLLY INDEPENDENT OF IT. UNDER THIS RULE, IT IS ERROR FOR THE TRIAL COURT TO ADMIT EVIDENCE OF ACCIDENT INSURANCE OR ANY OTHER INSURANCE IN BEHALF OF THE INJURED PERSON TO MITIGATE THE DAMAGES.**

Standard Oil Co. v. U. S., 153 Fed. (2d) 958;

Old Colony Ins. Co. v. U. S., 168 Fed. (2d) 931, 933;

Anheuser Busch, Inc. v. Starley, 28 Cal. (2d) 347, 170 P. (2d) 448;

Federal Tort Claims Act, 60 Stat. 843, USCA, Title 28, C. 20, Sec. 931(a).

Subd. (a), Sec. 931, Federal Tort Claims Act, supra, provides in part as follows:

> "* * * United District Court * * * shall have ex-exclusive jurisdiction to hear, determine and render judgment on any claim against the United States for money only * * * on account of damages * * * on account of personal injury * * * caused by the negligence * * * of any employee of the Government * * * under circumstances where the United States, if a private person, would be liable to the claimant for such damages, loss, injury * * * in accordance with the law of the place where the act or omission occurred."

It is respectfully submitted that "in accordance with the law" of California, it is error for the trial Court to admit evidence of accident insurance or any other

insurance, in a damage suit for personal injuries, to mitigate the damages recoverable. See *Anheuser Busch, Inc. v. Starley,* supra.

At the time defendant attempted to prove that plaintiff Gladys Shaylor carried insurance to cover her loss for such an injury, the trial Court sustained plaintiff's objection to the admissibility of such evidence. (R. 66.) However, later in the trial of the case, the trial Court changed his ruling and allowed defendant, over plaintiff's objections, to put in evidence the amount of money plaintiff had received from insurance to reimburse her for expenses as a result of her injuries. (R. 80-83.) It is respectfully submitted that such conduct of the trial Court denied appellants a fair trial.

> "The Court: She has just testified that he rendered bills for $140.00 and $110.50. If this fund paid this amount, or if it is paid by this group insurance, then, under the late decisions, I am under the impression now that I am not going to put the Government in the position of paying the bills twice. It is the plaintiff's duty to put in the case to establish these matters. It seems to me that this plaintiff destroys all the evidence now in regard to the bills." (R. 82-83.)

In this connection, counsel for defendant attempted to impeach the plaintiffs as to the payment of such expenses, by cross-examination as to whether their testimony, admitted prior to such examination, to the effect that plaintiffs personally had paid such amounts, was true or false, if insurance company had paid the same. (R. 80-83, 90-92.) It is again respect-

fully submitted that such conduct on the part of appellee's counsel denied appellants a fair trial.

It is respectfully submitted that the rule or principle that what one does through his agent, or insurance company, he does himself, which need no citation of authorities, is a complete or satisfactory answer to such attempts at impeachment. However, the error was committed and is reflected in the award of damages.

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2. **THE DECISION OF THE TRIAL COURT AS TO THE GENERAL DAMAGES IS NOT SUPPORTED BY THE EVIDENCE, IS CONTRARY TO LAW AND IS NOT SUSTAINED BY THE EVIDENCE IN THAT IT APPEARS FROM THE EVIDENCE THAT THE INJURIES TO THE PLAINTIFF WERE VERY SERIOUS AND THAT THE SUM AWARDED BY THE COURT WAS GROSSLY INADEQUATE—IN FACT SO INADEQUATE AS TO SHOCK THE HUMAN CONSCIENCE.**

Koebig v. Southern Pac. Co., 108 Cal. 235, 41 Pac. 469;

Bennett v. Hobro, 72 Cal. 178, 13 Pac. 473;

Loper v. Morrison, 23 Cal. (2d) 600, 611, 145 P. (2d) 1, 6;

Gackstetter v. Market St. R. Co., 10 Cal. App. (2d) 713, 714, 52 P. (2d) 998;

20 *Cal. Jur.* 104, Title New Trial, Sections 67, 68.

Applying this rule to the facts, we find that one of the appellants, Gladys, was knocked unconscious by the negligent operation of a Coast Guard truck owned and operated by appellee and remained unconscious for 12 hours (R. 25-26); and as a direct result received

the following injuries: Cerebral concussion, contusions of the scalp, contusion of right shoulder, possible fracture of the pelvis, contusion of the bladder, multiple contusions and abrasions and strains of extremities (R. 26); that as a result thereof, at the time of the trial, 12 months after such injuries, Gladys was suffering from headaches (R. 39-40), nervousness and pain requiring special belt to be worn constantly to relieve the pelvic injury. (R. 63.)

In view of such injuries, it is submitted that an award of only $500 as general damages is grossly inadequate and shocks the human conscience, especially where the trial Court found special damages of $460.25.

In *Loper v. Morrison,* supra, the Court held that where there was testimony at time of trial injured party still was suffering from headaches, nervousness and pain, tended to prove future damages.

In *Gackstetter v. Market St. R. Co.,* supra, the Court said that the test to be applied in determining whether damages in personal injury action is proper is a comparison of the amount of the award with the evidence before the trial Court.

Following this rule, it is submitted that by comparing the evidence before the trial Court, the award was grossly inadequate.

The fact that on motion for new trial, the trial Court increased the general damages from $500 to $1000 is strong evidence that the trial Court admits it made an error, at the conclusion of the trial, as to the amount of general damages.

3. **IN ASSESSING DAMAGES, THE COURT MUST CONSIDER THE CONTINUED AND RECENTLY ACCELERATED DEPRECIATION OF THE PURCHASING VALUE OF THE DOLLAR.**

Southern Pacific Co. v. Zehnle, 163 F. (2d) 453;
Butler v. Allen, 167 F. (2d) 488, 490;
Kircher v. A. T. & S. F. R. Co., 32 Cal. (2d) 176, 195 P. (2d) 427;
Buswell v. City of San Francisco, 200 P. (2d) 115 (Cal. App. 2d).

In *Buswell v. City of San Francisco,* supra, it was held that a comparison of awards in different cases, is not conclusive in view of the change in value of the dollar and difficulty of finding comparable injuries.

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4. **A FINDING OF THE AMOUNT OF DAMAGES BY THE COURT SHOULD BE SET ASIDE WHERE THE AMOUNT RECOVERABLE WAS PURELY A MATTER OF COMPUTATION AND WHERE THE COMPUTATION WAS INCORRECT.**

4 *Corpus Juris,* p. 888, n. 73, Section 2858, Title, Appeal and Error.

In this connection, plaintiffs testified as to the items of special damages (R. 40-42, 70-74) and there was no contradictory evidence. Therefore, it is respectfully submitted that the amount of special damages was purely a matter of computation.

Any attempts of counsel for defendant, after the Court allowed him to cross-examine the plaintiffs as to insurance, to impeach such direct evidence as to special damages, on the theory that plaintiffs did not pay such items personally, but through an insurance

company, was erroneous when we consider the principle of law that what a person does through an agent, he does himself. Again, we respectfully submit that such conduct of appellee's attorney denied appellants a fair trial. (R. 80-83; 90-92.)

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5. **A JUDGMENT FOR AN AMOUNT AWARDED CANNOT BE SUSTAINED WHERE THE JUDGMENT WAS WRONG ON ANY REASONABLE HYPOTHESIS.**

4 *Corpus Juris* 889 n. 82, Sec. 2858, Title Appeal and Error.

It is respectfully submitted that the failure of the trial Court to properly compute the items of special damages was error and by reason thereof, the judgment was wrong on any and all reasonable hypothesis.

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6. **WHERE THE FINDINGS OF THE TRIAL COURT ARE BASED ON UNDISPUTED EVIDENCE, ANY QUESTION AS TO THE SUFFICIENCY OF THE EVIDENCE TO SUSTAIN THE FINDINGS IS ONE OF LAW AND IN CONSEQUENCE REVIEWABLE BY THE APPELLATE COURT.**

4 *Corpus Juris* 882, n. 19, Section 2854, Title Appeal and Error.

As stated above, the evidence as to the items of special damage was undisputed. There is not an iota of evidence in the record to contradict such items. It is again respectfully submitted that the misconduct of defense counsel in his cross-examination of appellants, as to insurance payments is no contradiction.

7. IF THE FINDINGS ARE MANIFESTLY ERRONEOUS, THE JUDGMENT SHOULD BE REVERSED.

4 *Corpus Juris* 882, n. 23, Section 2854, Title Appeal and Error.

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8. FINDINGS SHOULD BE SET ASIDE WHERE THE TRIAL COURT ERRONEOUSLY ADMITTED EVIDENCE NOT MATERIAL TO THE ISSUE.

4 *Corpus Juris* 882-883, n. 29, Section 2854, Title Appeal and Error.

In this connection, appellants refer to and adopt the authorities and argument set forth under Points Nos. 2 and 4, pages 13, 14 and 15 of this brief.

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9. REFUSAL TO MAKE FINDINGS AS REQUESTED WILL BE REVIEWED WHERE THE REJECTED FINDINGS ARE PRESENTED BY THE RECORD ON APPEAL.

4 *Corpus Juris* 548, n. 89, Section 2347, Title Appeal and Error;

Knaust Bros. v. Goldschlag, 119 F. (2d) 1022.

At the time of the preparation and signing of the findings of fact and conclusions of law, counsel prepared and presented to the trial Court proposed findings of fact and conclusions of law. (R. 9.)

10. APPELLATE COURT CAN ORDER A RETRIAL ON A LIMITED ISSUE OR ISSUES, IF THAT ISSUE OR ISSUES CAN BE SEPARATELY TRIED WITHOUT SUCH CONFUSION AS WOULD AMOUNT TO A DENIAL OF A FAIR TRIAL, VIZ.: ISSUE OF DAMAGES.

Twenty-One Mining Co. v. Original Sixteen to One Mine, 265 F. 469, 471;

Gasoline Products Co. v. Champlin Ref. Co., 283 U.S. 494, 499, 75 L. Ed. 1188;

Brewer v. Second Baptist Church, 197 P. (2d) 713, 720 (Cal. Sup. Ct.).

It is respectfully submitted that the issues of special and general damages can be tried separately, without a trial on the issue of liability without such confusion as would amount to a denial of a fair trial; and that this rule is established by numerous authorities in both the federal and state Courts. (See *Twenty-One Mining Co.,* supra, 265 Fed. at page 471.)

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11. CONCLUSION.

The errors herein presented, if allowed to stand uncorrected, will result in a grave miscarriage of justice, particularly the conduct of the trial Court in awarding only $500 general damages for the injuries involved and in allowing in evidence the fact that appellants carried accident or other insurance and the misconduct of counsel for appellee in attempting to impeach appellants, or charging appellants with false testimony, after the admission of evidence as to part payment of the special damages by insurance car-

rier. Such errors are fundamental, prejudicial errors, which, we believe will lead this Court to grant a new trial on the issues of damages, general and special.

Dated, San Francisco, California,
April 4, 1949.

Respectfully submitted,
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